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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 480

MARTHA R. MOORE, WILLIAM W. RICHARDSON, JR., JULIA R. CORBIN, ROBERT R. RICHARDSON and WILLIAM R. INGRAHAM, Petitioners

v.

EMMA JEAN BROWN, Executrix of the Estate of George R. Brown, Deceased, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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EMMA JEAN BROWN, Executrix of the Estate of George R. Brown, Deceased, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your petitioners, Martha R. Moore, William W. Richardson, Jr., Julia R. Corbin, Robert R. Richardson and William R. Ingraham, defendants and additional defendant below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 27, 1957, reversing the judgment of the District Court in favor of petitioners and remanding the case to the District Court with instructions to reinstate the judgments in favor of plaintiff-respondent.

OPINIONS BELOW

The opinion of the District Court (15a-31a)* is reported in 143 F. Supp. 816. The opinion of the Court of Appeals is unreported. Nine additional copies of the opinion of the Court of Appeals have been filed with the Clerk contemporaneously with the filing of this petition. For the convenience of the Court nine additional copies of the appendices have been filed with the Clerk contemporaneously with the filing of this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1957 and is printed in Appendix B hereto infra, p. 34. A timely petition for rehearing was filed with the Court of Appeals on July 11, 1957 and the Court of Appeals denied said petition on August 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Where there is no decision by Pennsylvania's courts on the precise fact situation before a federal court in a diversity action but the State's highest court has crystallized facts comparable and analogous to those of the case at bar into a judicial rule for the determination of whether the relationship between two parties is that

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*Throughout this petition where references are made to the appendices, numbers followed by the letter "a" indicate Appellant's Appendix and numbers followed by the letter "b" indicate Appellees' Appendix. "T" in this petition refers to the typewritten transcript of the trial.

of master and servant or employer and independent contractor, does that State rule govern in the federal court?

In other words, in a diversity case, is the liability of a private hospital for the negligence of a house physician governed by the same rules of State law as apply to all other employers?

2. May a lower federal court, in a diversity case, ignore and disregard the rule of Pennsylvania law laid down by that State's highest court that a release or indemnity "from any damages" or "for any loss" is comprehensive language which covers all liability, including liability for negligence?

3. Where respondent at the trial of the case abandoned the theory of *respondeat superior* because she did not request the trial court, as prescribed by Rule 51, to submit that issue to the jury and instead expressly accepted and acquiesced in a different theory of the case, may the court of appeals review the case upon the abandoned theory when there was no objection, exception or motion to preserve that issue on appeal?

4. Where a federal trial judge, in a diversity case, reaches a reasonable and permissible conclusion upon a question of local law, may a federal court of appeals make a second guess, to substitute its guess as to what the local law might be?

5. Where a partnership, under applicable state law, is a juristic entity and a party to a suit against some of the individual partners and the partnership's only place of business is in the state of which plaintiff is a citizen, does a federal court lack jurisdiction in a diversity case against the nonresident partners because there is no diversity of citizenship?

STATUTES INVOLVED

The statutory provisions involved are: the Rules of Decision Act, 28 U. S. C. § 1652; Section 1 of the Pennsylvania Act of 1911, P. L. 639, as amended, 63 P. S. § 401a; and 28 U. S. C. § 1332(a)(1). They are printed in Appendix A, infra, pp. 32-33.

STATEMENT

This was a civil action brought in the District Court by respondent, as executrix of her husband's estate, under the Pennsylvania Wrongful Death Act and Pennsylvania Survival Act, to recover damages for her husband's death caused by the negligent medical care given to decedent by Dr. John L. Kelly, the Medical Director or house physician of Mercer Sanitarium while decedent was a patient there for care and treatment of a mental disorder. Petitioners were partners in the operation of the Sanitarium. The verdict of the jury establishes that respondent's husband died as the result of Dr. Kelly's malpractice. The jurisdiction of the District Court was invoked on the basis of diversity of citizenship and jurisdictional amount under 28 U. S. C. § 1332.

As the District Court observed (18a): "The facts relating to the employment of Dr. Kelly were proved by [respondent] and are not in dispute." The undisputed evidence produced by respondent established that petitioners employed Dr. Kelly as Medical Director of the Sanitarium at an annual salary and placed him, as a skilled professional man, in charge of diagnoses and treatment of patients on the understanding that he was to function according to his own personal judgment,

learning and skill. It was not shown at the trial that petitioners had any control or right to control Dr. Kelly in the performance of his professional duties. *Instead, respondent affirmatively proved by uncontradicted testimony that petitioners had no control or right of control over Dr. Kelly in the discharge of his professional duties to Brown and other patients* (16a-17a, 22a, 3b, 4b, 7b, 8b, 13b, 18b, 22b,-23b, 24b).

Petitioners, at the close of respondent's evidence, moved to dismiss under Rule 50(a) (22a; T. 422-426, 426-427). The District Court, at that time and at all times thereafter, was of the opinion and ruled that, under the evidence and the law of Pennsylvania, Dr. Kelly was an independent contractor and that petitioners were not liable for his malpractice under the doctrine of *respondeat superior* (22a; T. 430, 433, 435, 653). Notwithstanding that conclusion and ruling, the District Court did not grant the motions to dismiss or direct a verdict at that time and instead submitted the case to the jury on the theory that by reason of the hospital-patient relationship petitioners impliedly agreed to furnish respondent's husband proper medical care and treatment, from which agreement arose a nondelegable duty to do so and that a tortious breach thereof by petitioners' house physician would cast vicarious liability upon them (22a; T. 703-706). The District Court did not submit the case to the jury on the theory of *respondeat superior* nor instruct the jury to determine whether Dr. Kelly was acting as servant or independent contractor in the discharge of his professional duties at the Sanitarium (T. 426, 430, 435, 674). The jury was only instructed to find whether Dr. Kelly was negligent in the medical care and treatment afforded respondent's husband or not and, if they found

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that he was, to return a verdict for respondent in each action (T. 705-706).

Petitioners filed a motion, under Rule 50(b), for directed verdict (28b) and also took exceptions, under Rule 51, to the charge of the District Court (T. 726-728, 733-734, 735-736).

Respondent did not file a written request with the trial court to submit the case to the jury on the doctrine of *respondeat superior* or to instruct the jury to find whether or not Dr. Kelly was a servant of the Sanitarium nor did she object to the failure to do so, as required under the provisions of Rule 51. In fact, when invited by the Trial Judge, at the conclusion of the charge, to object or except, respondent's counsel said (T. 739):

> "If the Court please, I want to sincerely congratulate this Court on the charge given in this case. *We have no complaints about it.* . . . it covers the whole situation and is as clear, concise, and lucid as possible under the circumstances." (Emphasis supplied).

The jury found that the death of respondent's husband was caused by the malpractice of Dr. Kelly and returned a verdict for respondent in each action (11a). The District Court entered judgments in accordance with the verdicts (11a-12a). Petitioners thereafter filed a motion to set aside the verdicts and judgments in favor of respondent and to enter judgment for petitioners in accordance with the motion for directed verdict (13a, 29b-34b).

The District Court set aside the judgments for respondent entered on the verdicts and entered judgment

for petitioners in accordance with the motions for directed verdict because: (1) the evidence showed that petitioners had no control or right to control Dr. Kelly in the performance of his professional duties and, under the fundamental rule in Pennsylvania, he was an independent contractor in the medical care and treatment given patients, and petitioners were not liable for his negligence in the care and treatment of patients (19a-22a, 24a, 26a); and (2) after considering "all the available data", when no conclusive state authority was found on the precise facts, including the strong indicia that the appellate courts of Pennsylvania are extremely reluctant to extend the doctrine of nondelegable duty to liability for negligence beyond the point where personal supervision and judgment must in the very nature of the case end, the District Court was of the opinion "that the law of Pennsylvania does not presently cast a non-delegable duty to care for and treat patients upon the owners of a private sanitarium for profit" (23a-26a).

The Court of Appeals for the Third Circuit reversed the judgment of the District Court and remanded the cause with direction to reinstate the judgments in favor of respondent, because in its opinion the Supreme Court of Pennsylvania might hold that the doctrine of *respondeat superior* was applicable under the precise facts of this case as evaluated by the Court of Appeals. The Court of Appeals did not rest its decision upon the theory on which the case was tried below, that is, the theory of a nondelegable duty to provide proper medical care and treatment to a patient arising out of the hospital-patient relationship.

The Court of Appeals also held that a release signed by respondent and her husband releasing the Sanitarium

"from any damages" on account of "any form of recognized medical treatment" administered to the husband as deemed advisable by the Medical Staff of the Sanitarium did not apply to any injury caused by treatment of any kind other than that given to him as a neurotic (p. 16). The Court of Appeals further held that an agreement signed by respondent "to indemnify" the Sanitarium "for any loss resulting from injury to" respondent's husband "in no wise expresses in unequivocal terms an intent or purpose on the part of [respondent] to indemnify [petitioners] for loss resulting from the negligence of Dr. Kelly or the Sanitarium staff" (p. 18). The District Court, since it found that under Pennsylvania law the petitioners were not responsible for the physician's malpractice, did not reach the question of the release and indemnity agreements.

REASONS FOR GRANTING THE WRIT

1. *The decision of the Court of Appeals, in formulating the applicable local law in a diversity action instead of merely ascertaining and applying it in the light of the common law of the state, failed to apply the doctrine established by the decisions of this Court in Erie R. Co. v. Tompkins,* 304 U. S. 64, *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, *and West v. American Telephone & Telegraph Co.,* 311 U. S. 223. *The decision is also in conflict with the decision of the Court of Appeals for the First Circuit in Boston Casualty Co. v. Bath Iron Works Corporation,* 136 F. 2d 31, *the decision of the Court of Appeals for the Third Circuit in Venuto v. Robinson,* 118 F. 2d 679, *and the decision of the Court of Appeals for the Eighth Circuit in Elder v. Dixie Greyhound Lines,* 158 F. 2d 200. It presents an important question in federal-state relationship and under the Rules of Decision Act.[1]

In *Erie R. Co. v. Tompkins,* 304 U. S. 64, 78, this Court overruled *Swift v. Tyson,* 16 Pet. 1, and held that in diversity actions the law to be applied in the determination of the substantive rights of the parties is the law of the State, whether declared by its Legislature in a statute or by its highest court in a decision.

In *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, 209, and *West v. American Telephone & Telegraph Co.,* 311 U. S. 223, 237, this Court outlined the procedure to be followed in the application of the "State law" to a controversy controlled by Erie. In the *West* case, *supra* at 237, this Court said:

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1. 28 U. S. C. § 1652.

> "State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts."

In this case the question before the District Court at the conclusion of the respondent's case was whether a physician is the servant of a private hospital which employs him as house physician in the discharge of his professional duties. Admittedly, there is no Pennsylvania case which has dealt with the precise facts involved in the instant case. Accordingly, the District Court, adhering to the mandate of this Court, correctly referred, under the record as made out by the respondent and therefore binding upon her under Pennsylvania law,[2] to the common law of Pennsylvania applicable generally in the determination of the question as to whether the relationship between two parties is that of master and servant or employer and independent contractor. That general rule in Pennsylvania is that the relation of master and servant exists only when the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished and where the principal does not have actual or potential control of the means and methods by which the employee transacts the business, the employee is an

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2. *Conley v. Mervis*, 324 Pa. 577, 586, 188 A. 350; *Kline v. Kachmar*, 360 Pa. 396, 402, 61 A. 2d 825; *Karcesky v. Laria*, 382 Pa. 227, 230, 114 A. 2d 150.

independent contractor and the doctrine of *respondeat superior* does not apply. It suffices to cite some of the host of Pennsylvania decisions which have applied these principles to situations comparable to the case at bar.[3] As the District Court well summarized the Pennsylvania law (19a): "Control or potential control over the servant seems to be the essence of liability." The District Court then ruled (22a) that since respondent had not shown that petitioners had any control or right to control Dr. Kelly in the performance of his professional duties to respondent's husband, Dr. Kelly was an independent contractor and under the law of Pennsylvania petitioners were not liable for his malpractice since they had exercised reasonable care in selecting him.[4]

The District Court followed the procedure laid down for it by the Court of Appeals for the Third Circuit in

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3. *Long v. Eastern Paving Co.*, 295 Pa. 163, 166, 145 A. 71; *Silveus v. Grossman*, 307 Pa. 272, 277-278, 161 A. 362; *Fuller v. Palazzolo*, 329 Pa. 93, 105-106, 197 A. 225; *Doerr v. Rand's*, 340 Pa. 183, 186, 16 A. 2d 377; *Joseph v. United Workers Ass'n*, 343 Pa. 636, 638-639, 23 A. 2d 470; *Feller v. New Amsterdam Casualty Co.*, 363 Pa. 483, 486, 70A. 2d 299; *Murrin v. Rifugiato*, 373 Pa. 561, 563-564, 96 A. 2d 865; *Ragano v. Socony Vacuum Oil Co.*, 376 Pa. 271, 274, 101 A. 2d 686; *Townsend v. Pittsburgh*, 383 Pa. 453, 457, 119 A. 2d 227.

4. This Court has repeatedly sustained the right of the trial courts to instruct juries and direct verdicts on a theory if the evidence is insufficient to sustain a verdict thereon: *Pleasants v. Fant*, 22 Wall. 116, 121; *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 369, 384; *Galloway v. United States*, 319 U. S. 372, 389, 394. The Supreme Court of Pennsylvania has enunciated a similar rule: *Knight v. Gulf Refining Co.*, 311 Pa. 357, 361, 166 A. 880; *Marlowe v. Travelers Ins. Co.*, 313 Pa. 430, 433, 169 A. 100.

Venuto v. Robinson, 118 F. 2d 679, 681-682, when Judge Goodrich said:

> "Ordinarily, the problem of determining, upon evidentiary facts whether the relationship between two parties is that of master and servant or employer and independent contractor is one to be answered by the triers of the facts. Restatement, Agency § 220. But here, as in many other places in the law, answers to the fact questions have been crystallized through judicial determination. If facts comparable to those in this case have been crystallized into judicial rule in New Jersey, that rule governs in the federal court. Compare Stoner v. New York Life Ins. Co., 1940, 61 S. Ct. 336, 85 L. Ed.—.
>
> "The problem then becomes one of fact matching of various decisions to see whether a set of facts under consideration is covered by the adjudicated cases. Obviously, the problem is, in most instances, a matter of judgment for an exact duplication of one piece of litigation by another is never found. But an examination of New Jersey decisions convinces us that, in situations where the facts establishing the independent contractor relationship were weaker than in the instant case, the courts have held the relationship between the parties to be that of employer and independent contractor. . . . It follows, therefore, that the trial court was in error in failing to give the binding instructions on this point requested by the defendant."

The same rule was laid down in *Boston Casualty Co. v. Bath Iron Works Corp.*, 136 F. 2d 31, 33, where the Court of Appeals for the First Circuit said:

"Our only inquiry under the rule laid down in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, is to determine whether a cause of action is stated under Maine law. It has been urged upon us that the Supreme Judicial Court of Maine has never decided the precise issue before us and that, therefore, we are free to determine this question in the first instance. While it is true that this court may in a proper case be called upon to determine what the local law is, there being no decided cases in point, New England Mutual Life Insurance Co. v. Mitchell, 4 Cir., 1941, 118 F. 2d 414, certiorari denied 314 U.S. 629, 62 S.Ct. 60, 86 L.Ed. 505; Venuto v. Robinson, 3 Cir., 1941, 118 F. 2d 679, nevertheless, when it is clear from the decisions of the state court what the law is, we are not at liberty to establish a new rule because we are of the opinion that it is sounder or of more general application, West v. American Telephone & Telegraph Co., 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, 132 A.L.R. 956; Yoder v. Nu-Enamel Corporation, 8 Cir., 1941, 117 F.2d 488. As was well said in the Yoder case, supra, page 489 of 117 F.2d: '* * * The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed."

The duty of a lower federal court in circumstances similar to the case at bar was set forth as follows by the

Court of Appeals for the Eighth Circuit in *Elder v. Dixie Greyhound Lines*, 158 F. 2d 200, 202:

> "On this appeal the numerous decisions of the courts of Missouri establishing and defining the doctrine of respondeat superior in tort cases in that state have been cited and considered. The parties present no dispute as to general principles governing the question of the master's liability for torts of his servant and the limits to such liability. But hardly any one of the many cases passed on is exactly like another, and the duty of the federal trial court in such a case as this is to compare the proof in the case before it with that in the authoritative analogous cases which have been passed on in the state, and to follow the state law in its decision."

One might have expected that the Court of Appeals, since it recognized (pp. 5-6) that there was evidence that petitioners had no control of Dr. Kelly in the performance of his professional duties and its attention was called, in the opinion of the District Court and petitioners' brief, to the multitude of Pennsylvania cases holding that the element of control is the crucial element in the determination of whether the relationship between two parties is that of master and servant or employer and independent contractor, would have matched the facts in the instant case to those of the State decisions to see whether the set of facts under consideration were covered by the adjudicated cases and compared the proof in the case before it with that in the authoritative analogous State cases. But no, the Court shrank from its duty to seek out and apply the State law and instead, merely because there was no State decision on the precise

facts of the instant case, ignored the rules of law as apply to all other employers in Pennsylvania and based its decision on dicta or upon speculation as to what the local court might decide in light of dicta if faced with a fact situation similar to that which the Court of Appeals, but not the District Court, thought was involved in this case. Other courts of appeal that have considered the problem have concluded that the responsibility of the federal courts, in matters of local law in like situations, is not to formulate the State law, but merely to ascertain and apply it in the light of the State's common law: *New England Mut. Life Ins. Co. v. Mitchell,* 118 F. 2d 414, 420, *cert. den.* 314 U. S. 629, and cases cited *supra.*

An examination of the Pennsylvania decisions plainly demonstrates that in situations where the facts establishing the independent contractor relationship were weaker than in the instant case, the Supreme Court of Pennsylvania has held the relationship to be that of employer and independent contractor. In the instant case there is positive testimony that Dr. Kelly was not subject to control by petitioners in the discharge of his professional duties and that he would not have stood for any such control or supervision. Further, there is inherent in the independent nature and character of the medical profession and the State laws regulating the practice of the profession the inference that petitioners did not have any control or potential control of Dr. Kelly in the practice of medicine. In the absence of overwhelming evidence that petitioners exercised such control, no court may infer any exercise of such control and any concomitant unlawful conduct by petitioners.

The fact that Dr. Kelly was paid a salary by petitioners, which seemingly is stressed by the Court of Ap-

peals, while it ignored the facts of no control of Dr. Kelly by petitioners and the independent calling of a physician, under Pennsylvania law, is not a material factor and does not destroy the independent character of the employment.[5]

Another settled rule of Pennsylvania law which was ignored by the Court of Appeals in arriving at its decision is the rule that an employer who, under law, is required, as a condition precedent to the operation of his business, to employ certain licensed personnel over whom he cannot, under law, exercise any control in the performance of their duties, is not liable for the torts of such licensed persons: *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 199, 201, 203, 33 A. 239. A perusal of the applicable statutory law of Pennsylvania and the evidence in this case (19b) makes it abundantly clear that petitioners were required to place a qualified physician in charge of patients at the Sanitarium and that such physician in medical matters was required to act on his own best judgment and could not permit others not licensed to unlawfully practice medicine through him.[6]

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5. *Harrison v. Collins*, 86 Pa. 153, 159; *Mansfield Coal & Coke Co. v. McEnery*, 91 Pa. 185, 192; *Karl v. Juniata County*, 206 Pa. 633, 640, 56 A. 78; *Feller v. New Amsterdam Casualty Co., supra; Tyler v. McFadden Newspaper Corp.*, 107 Pa. Superior Ct. 166, 174, 163 A. 79; *Sechrist v. Kurtz Bros.*, 147 Pa. Superior Ct. 214, 219, 24 A. 2d 128; *Blum Unemployment Compensation Case*, 163 Pa. Superior Ct. 271, 276, 60 A. 2d 568.

6. Act of 1911, P. L. 639 § 1, as amended, 63 P. S. § 401(a); Mental Health Act of 1923 P. L. 998, § 201; *State Bd. of Medical Ed. & Licensure v. Ferry*, 172 Pa. Superior Ct. 372, 378-379, 94 A. 2d 121.

We respectfully submit that the Court of Appeals, under the doctrine laid down by this Court, should have ascertained the controlling State law from the common law of Pennsylvania set forth above and determined the liability of petitioners by the same rules of law as apply to all other employers in Pennsylvania.

The Court of Appeals, we submit, also erred in its second alternative conclusion (p. 11) that the Supreme Court of Pennsylvania might apply the doctrine of *respondeat superior* and hold the petitioners liable for the physician's malpractice where there has been a holding out or a representation to a patient or his family, as members of the public, that medical treatment is to be administered in a private hospital by a doctor employed therein. First, that theory was never mentioned at trial and the instant case was not tried on any such theory (25a). Second, there is no evidence of any such representation by petitioners. Third, that question was never submitted to the jury and the jury never found that petitioners represented they would furnish respondent's husband reasonably skillful medical care and treatment through Dr. Kelly. Fourth, if there were any presumption or inference along the lines suggested by the Court of Appeals from the surrounding circumstances, which we strenuously deny, under Pennsylvania law,[7] it was wholly lost when respondent produced affirmative testimony by her own witness that Dr. Kelly was not under the control of petitioners but was an independent contractor. Fifth, as the District Court observed (25a), in

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7. *Felski v. Zeidman*, 281 Pa. 419, 421-422, 126 A. 794; *Midora v. Alfieri*, 341 Pa. 27, 30-31, 17 A. 2d 873; *Kunkel v. Vogt*, 354 Pa. 279, 281-282, 47 A. 2d 195; *Hertz v. Record Pub. Co.*, 219 F. 2d 397, 399 (C. C. A. 3).

view of the Pennsylvania statute prohibiting the practice of medicine without a license, respondent and her husband could not have accepted the professional medical services of Dr. Kelly in the reasonable belief that he, while rendering them, was a servant of petitioners. Sixth, under the law of Pennsylvania, where one engages a contractor, especially in a learned or technical field, to perform a job, the employer is entitled to rely on the knowledge and skill of the contractor to whom the task has been entrusted and the responsibility for any harm caused to another thereby is that of the contractor and not of the employer.[8]

Respondent and her husband, when the latter was admitted into the Sanitarium, signed a release reading as follows (27b):

> "The undersigned does hereby give THE MERCER SANITARIUM permission to administer any form of recognized medical treatment, including Electro-Shock Therapy, to George R. Brown which is deemed advisable by the Medical Staff of said Sanitarium, and does hereby release THE MERCER SANITARIUM and its employees from any damages on this account."

At the same time respondent executed a written agreement which reads, in part, as follows (27b):

> "I agree to indemnify THE MERCER SANITARIUM for any loss resulting from injury to, or injury or damage caused by George R. Brown while a patient of Dr. J. L. Kelly and the said Sanitarium herein mentioned."

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8. *Silveus v. Grossman*, 307 Pa. 272, 277-278, 161 A. 362; *Doerr v. Rand's*, 340 Pa. 183, 186, 16 A. 2d 377; *Townsend v. Pittsburgh*, 383 Pa. 453, 457, 119 A. 2d 227.

The Court of Appeals avoids the release by interpreting it (p. 16) to mean that it "was to relieve the Sanitarium of liability for any injury resulting to Brown from his treatment as a neurotic at the Sanitarium", that is, from electro-shock therapy or treatment of a similar nature but not from injury from any other kind of medical treatment. The Court of Appeals refers to no Pennsylvania law to support its narrow interpretation which plainly is contrary to the clear, emphatic and comprehensive language of the release, that the permission is to administer "*any* form of recognized medical treatment, including Electro-Shock Therapy" and the release is from "*any* damages on this account." The Court of Appeals, in arriving at its interpretation, gave no effect to and ignored the rule of Pennsylvania law that a release from "*any*" or "all" damages is clear, precise, unequivocal and comprehensive language which includes everything and excludes nothing and is broad enough to cover liability for negligence.[9] It is manifest from a

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9. In *Buckwalter v. Black Rock Bridge Co.*, 38 Pa. 281, 287, it was held that "any damages" means "all damages". In *Cannon v. Bresch*, 307 Pa. 31, 34, 160 A. 692, it was held that a release "from any and all damage" from certain causes covered damages from acts of active negligence. Also see: *Glen Alden Coal Co. v. Scranton*, 282 Pa. 45, 48-49, 127 A. 307, and *Harper v. Consolidated Rubber Co.*, 284 Pa. 444, 453, 131 A. 356, that "*any*" is a broad and comprehensive term which generally means *all*. In *Pennsylvania L. R. B. v. Rooney*, 389 Pa. 587, 591, 133 A. 2d 533, the Court said: "In *Commonwealth v. One 1939 Cadillac Sedan*, 158 Pa. Superior Ct. 392, 396, 45 A. 2d 406, construing an Act of Assembly, the Superior Court declared that '*a more comprehensive word than "any" could hardly be employed.* It means indiscriminate, or without limitation or restriction.'" (Emphasis supplied).

perusal of the opinion of the Court of Appeals that it made no effort to ascertain and apply the Pennsylvania law in the interpretation of the release.

The Court of Appeals disposes (p. 18) of the indemnity agreement signed by respondent on the ground that it "in no wise expresses in unequivocal terms an intent or purpose on the part of [respondent] to indemnify [petitioners] for loss resulting from the negligence or malpractice of Dr. Kelly." The Court of Appeals cites, in support of its decision, three Pennsylvania cases enunciating the fundamental rule, with which we have no quarrel, that in the absence of a clear expression of intent to the contrary, a contract of indemnity will not be construed to indemnify against the negligence of the indemnitee. But the language of this indemnity is "for *any* loss resulting from injury to" respondent's husband "while a patient of Dr. Kelly and the said Sanitarium." The Pennsylvania appellate courts have held that a provision in a lease relieving the landlord "from all liability for any and all damages caused by water" *(Cannon v. Bresch, supra)*, a provision in a lease "to pay all damages to persons or property upon the demised premises and to save [indemnitee] harmless therefrom" *(Tidewater Field Warehouses, Inc. v. Whitaker Co.*, 370 Pa. 538, 541-542, 88 A. 2d 796), and a provision in a lease that "lessor shall not be liable for any injury or damage from any cause whatever" to tenant and others *(Wright v. Sterling Land Co.*, 157 Pa. Superior Ct. 625, 628-629, 43 A. 2d 614, allocatur refused by the Supreme Court of Pennsylvania, 158 Pa. Superior Ct. xxv), is clear, precise, unequivocal and comprehensive language, broad enough to cover liability for negligence of the indemnitee. Again, it is plain that the Court of Appeals in the interpreta-

tion of the indemnity agreement did not ascertain and apply the applicable State Law[10] as it was its duty to do under the doctrine of *Erie*.

The Court of Appeals plainly misinterprets the rule of *Fidelity Union Trust Co. v. Field*, 311 U. S. 169, for that decision of this Court does not hold that in the absence of a state decision on the precise facts, the lower federal courts are free to determine the state law in accordance with what their opinion is as to what the local court might do in the precisely same fact situation. What occurred in the *Fidelity* case was that the Court of Appeals for the Third Circuit took the view, in reversing the judgment of a district court, that it was not bound by any pronouncements other than those of the state court of last resort, and this Court reversed the Court of Appeals and affirmed the District Court holding that decisions of the Court of Chancery of New Jersey were entitled to respect as announcing the law of the state and that the federal court was not at liberty to reject them because it did not agree with their reasoning. The *Fidelity* case, we submit, supports petitioners' contention that the Court of Appeals in this case was not free to reject and ignore, in a private hospital-house physician situation, the Pennsylvania law generally governing employers in Pennsylvania because it did not like the result which follows therefrom in the instant case.

It is clear that the Court of Appeals, seemingly because of a deep sympathy for the victims of the hazards of negligence, was unwilling in this case to follow the governing rules under the Rules of Decision Act as laid down by this Court and to ascertain and apply the con-

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10. See footnote 9, supra.

trolling State law of Pennsylvania as enunciated in analogous and comparable situations in decisions of Pennsylvania's highest court. Doctrines must be enforced to be respected. If they are merely left as something on paper, because this Court will not review even as flagrant a violation as the one in the instant case, they might as well be written on water. If the decision of the Court of Appeals in the case at bar is sound, then surely "the ghost of *Swift v. Tyson, supra,* still walks abroad, somewhat shrunken in size, yet capable of much mischief:" *Sampson v. Channell,* 110 F. 2d 754, 761 (C. C. A. 1).

2. *The Court of Appeals erred in disregarding the provisions of Rule 51 and the rule as to scope of review on appeal applicable in the federal courts. This departure of the Court of Appeals from accepted and usual course of judicial proceeding calls for the exercise of this Court's power of supervision.*

Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, provides:

> "At the close of the evidence, . . , any party may file written requests that the court instruct the jury on the law as set forth in the requests. . . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

This Rule has the force of law and is, in substance, the rule which has always prevailed in the federal courts.

Where, as here, a party files no written request with the trial judge to instruct with respect to a certain theory

nor objects to the failure of the trial judge to give such instructions, that party, on appeal, is precluded from assigning such failure as error. The theory on which a case is tried nisi, with the consent and acquiescence of appellant, is the theory on which it must, on appeal, be weighed for error. Even if an appellant is entitled to have his case submitted to the jury on a theory more favorable to him than that embodied in the instructions, there can be no reversal of the judgment upon such theory where appellant failed to preserve that theory for appeal, by requests for instructions or objections to the instructions given.[11]

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11. *United States v. Southmayd,* 9 How. 637, 646; *Peck v. Henrich,* 167 U. S. 624, 629; *Louisville & Nashville R. Co. v. Parker,* 242 U. S. 13, 135; *Pennsylvania R. Co. v. Minds,* 250 U. S. 368, 375; *Virginian Ry. Co. v. Mullens,* 271 U. S. 220, 227-228; *Helvering v. Wood,* 309 U. S. 344, 349; *Edwards Mfg. Co. v. Bradford Co.,* 294 F. 176, 180 (C. C. A. 2); *Arkansas Anthracite Coal & Land Co. v. Stokes,* 2 F. 2d 511, 518 (C. C. A. 8); *Sacramento Sub. Fruit Lands Co. v. Melin,* 36 F. 2d 907, 909 (C. C. A. 9); *New York Life Ins. Co. v. Calhoun,* 114 F. 2d 526, 543 (C. C. A. 8), cert. den. 311 U. S. 701; *Reidy v. Mynitti,* 116 F. 2d 725, 729 (C. C. A. 9); *Ramming R. E. Co. v. United States,* 122 F. 2d 892, 893-894 (C. C. A. 8); *Mill Owners Mut. Fire Ins. Co. v. Kelly,* 141 F. 2d 763, 766 (C. C. A. 8); *Cafasso v. Pennsylvania R. Co.,* 169 F. 2d 451, 454 (C. A. 3); *Stilwell v. Hertz Drivurself Stations,* 174 F. 2d 714, 715 (C. A. 3, defense of Statute of Limitations though plead and plainly a good defense to a substantial part of plaintiff's claim not considered on appeal since not preserved under Rule 51); *Moore v. Waring,* 200 F. 2d 491, 492 (C. A. 2); *Lively v. Elkhorn Coal Co.,* 206 F. 2d 396, 399 (C. A. 6, where one of plaintiff's theories of recovery not submitted by trial judge because in his opinion evidence was insufficient to sustain it, held question of that theory not before court on review, since plaintiff had not complied with Rule 51); *Board of Commissioners v. Smyth,* 187 F. 2d 11, 12 (C. A. 5), cert. den. 342 U. S. 821; *Comins v. Scrivener,* 214 F. 2d 810, 815 (C. A. 10).

Since respondent at no time during the trial of this case filed a written request that the District Court instruct the jury on her theory that Dr. Kelly was the servant of petitioners and they, therefore, liable for his malpractice and instead, consented and acquiesced to the submission of the case on the theory of a non-delegable duty implied from the hospital-patient relationship, the former theory was not before the Court of Appeals for review and the judgment of the District Court should not have been reversed on the basis of that theory.

3. *The decision of the Court of Appeals overruling a reasonable and permissible conclusion of the District Court upon a doubtful question of local law is in conflict with decisions of the Courts of Appeals for the Eighth, Ninth and Tenth Circuits.*

In *Russell v. Turner*, 148 F. 2d 562, 564 (C. C. A. 8); *Heikes v. New York Life Ins. Co.*, 171 F. 2d 460, 464 (C. A. 8); *Mast v. Illinois Central R. Co.*, 176 F. 2d 157, 163 (C. A. 8); *Northern Liquid Gas Co. v. Hildreth*, 180 F. 2d 330, 336 (C. A. 8); *Mitton v. Granite State Fire Ins. Co.*, 196 F. 2d 988, 992 (C. A. 10); *People v. United States*, 235 F. 2d 647, 654 (C. A. 9); and *Warner v. First Nat. Bank*, 236 F. 2d 853, 860 (C. A. 8), the Courts of Appeals for the Eighth, Ninth and Tenth Circuits have laid down the salutory rule that if a federal district judge has reached a permissible conclusion upon a doubtful question of local law, a court of appeals will not overrule him even though it may think the law should be otherwise. The Courts of Appeals in these Circuits have said that all that a Court of Appeals should do in reviewing cases governed by

state law is to see that the determination of the District Court is not induced by a clear misconception or misapplication of law.

This approach is well-stated in *Russell v. Turner, supra,* thusly (p. 564):

> "The considered opinion of a trial judge as to a question of local law may properly be accorded great weight by this court. It will not adopt a view contrary to that of the trial judge unless convinced of error. Magill v. Travelers Ins. Co., 8 Cir., 133 F. 2d 709, 713; Roth v. Swanson, 8 Cir., 145 F. 2d 262, 266, 268; Doering v. Buechler, 8 Cir., 146 F. 2d 784, 788; Railway Mail Ass'n v. Chamberlin, 8 Cir., 148 F. 2d 206. This does not mean that an appellant, in order to obtain a reversal of a judgment in a case such as this, must demonstrate error to a mathematical certainty, but it does mean that this court will not overrule a decision of a trial judge upon a question of state law except for cogent and convincing reasons. Compare Yoder v. Nu-Enamel Corporation, 8 Cir., 145 F. 2d 420, 423-425; Roth v. Swanson, supra, page 269 of 145 F. 2d; Anderson v. Sanderson & Porter, 8 Cir., 146 F. 2d 58, 62. All that this court reasonably can be expected to do in reviewing cases governed by state law is to see that the determination of the trial court is not induced by a clear misconception or misapplication of the law."

Assuming *arguendo*, that the question of local law involved in this case was doubtful, which we unequivocally deny, a perusal of the opinion of the Court of Appeals demonstrates that that Court recognized that

the District Court reached a permissible conclusion on that question of local law for, *inter alia*, the Court of Appeals admitted (pp. 6-7) that the determination of the District Court that Dr. Kelly was an independent contractor and petitioners were not liable for his malpractice has support "in the law of some States, perhaps of a majority", and (p. 9) that in Pennsylvania, which goes further than most states in the protection of employers of independent contractors, it is the law that an employer of an independent contractor is not liable for the latter's negligence if the contractor was selected with due care and that there is a presumption under Pennsylvania law he was so selected. *Nowhere did the Court of Appeals suggest or even intimate that the District Court's decision was premised on a clear misconception or misapplication of Pennsylvania law.* Accordingly, the Court of Appeals should not have overruled the District Court, to substitute its opinion of what the Supreme Court of Pennsylvania might do under the precise facts of this case, not as found by the Trial Judge but as viewed by the Court of Appeals.

Since decisions of the federal courts on questions of state law are mere *ad hoc* pronouncements which perforce must fall before the first adverse pronouncement of the state appellate courts and the federal courts should be reluctant to extend undefined frontiers of state law, we submit the rule followed in the Eighth, Ninth and Tenth Circuits is the sensible and proper approach and should be adopted by this Court as the rule to be followed throughout the Federal Judicial System.

4. *Courts below erred in failing to dismiss the instant case for lack of jurisdiction since there was no diversity of citizenship between plaintiff and all of the defendants.*

It is a well-settled rule that federal courts do not have jurisdiction on the ground of diversity of citizenship, unless that diversity exists between all of the plaintiffs, on the one hand, and all of the defendants, on the other hand, at the time suit was instituted: *Strawbridge v. Curtiss,* 3 Cranch 267.

In recent times, the law has developed the concept of a partnership as a jural entity, separate and distinct from its members. This jural entity concept has been adopted in Pennsylvania: Pennsylvania Uniform Partnership Act of 1915 P. L. 18, 59 P. S. § 1, *et seq.;* Rule 2128(a) of the Pennsylvania Rules of Civil Procedure; 2 Goodrich-Amram, *Civil Practice,* § 2128(a)-1.

It was held by a District Court sitting in Pennsylvania within the Third Circuit, on the basis of the jural entity concept, that a partnership is a citizen and resident of the state of its principal place of business. This decision was followed by a District Court sitting in Vermont within the Second Circuit.

In *Darby v. Philadelphia Transp. Co.,* 73 F. Supp. 522 (E.D. Pa.), the plaintiff, a citizen of South Carolina, brought an action in a federal district court in Pennsylvania against the defendant corporation, a citizen of Pennsylvania, and two individual defendants, citizens of Pennsylvania, and a third individual defendant, a citizen of Delaware, individually and trading in a firm name, as a partnership. The partnership had its prin-

cipal place of business in Pennsylvania. A motion to dismiss was filed on the ground, *inter alia*, that the venue was improperly laid. The defendants in that case contended that a partnership has no citizenship independent of its members and that since one of them was a citizen and resident of Delaware and invoked her privilege of venue, the complaint had to be dismissed. The Court denied the motion to dismiss, saying (p. 523):

> "In connection therewith Rule 17 (b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, makes the capacity of a defendant to sue or be sued, determined by the law of the state wherein the federal court is located. Busby v. Electric Utilities Employees Union, 323 U.S. 72, 65 S.Ct. 142, 89 L. Ed. 78; Pullman Standard Car Mfg. Co. v. Local Union No. 2928, 7 Cir., 152 F. 2d 493. Accordingly, resort is then had to Rule 2128(a) of the Pennsylvania Rules of Civil Procedure, 12 P.S. Appendix, wherein the plaintiff has the option of naming any of the members of a partnership, or the partnership entity, as the defendant, or may join any combination of partners and the partnership entity as defendants, the partnership itself being recognized as an entity, separate and distinct from its members. In re Julian D.C.M.D. Pa. 22 F. Supp. 97. *Therefore it is apparent that for the purpose of suit in a federal court a partnership has a jural entity.*" (Emphasis supplied).

In *Remington's Dairy v. Rutland Ry. Corp.*, 15 F.R.D. 489, 20 F.R.S. 251 (D. Vt.), the plaintiff was a partnership whose principal place of business was

in Rhode Island. A motion to dismiss was filed on the ground, *inter alia,* that the complaint failed to show diversity of citizenship of the parties. The Court, in denying the motion to dismiss, said:

> "It seems a settled rule that—as far as diversity is concerned—a partnership will be deemed to be a resident of the district wherein it has its principal place of business."

The proper ascertainment of the jurisdictional question is not to be determined by any mechanics of plaintiff's pleadings but rather by the actual facts established by the record: *Indianapolis v. Chase National Bank,* 314 U. S. 63, 69-70.

Turning to the actualities of this litigation, it clearly appears from a perusal of the complaint, as amended, that the four individual defendants were sued as partners. The Court of Appeals recognized that the District Court correctly concluded that defendants were partners together with the additional defendant in the operation of the Sanitarium (p. 5). In fact, paragraph 3A of the complaint recites that defendants "were registered" under the applicable Pennsylvania statute "to do business as Mercer Sanitarium" and thereafter the complaint refers to the "Sanitarium" and its agents, employees and servants as doing or failing to do certain things which are alleged to constitute actionable negligence. Plainly, this action was instituted under the provisions of Rule 17(b) of the Federal Rules of Civil Procedure and of Rule 2128(a) of the Pennsylvania Rules of Civil Procedure against the partnership as well as the named individual defendant partners.

Respondent was a citizen of Pennsylvania. The partnership (Sanitarium), since its only place of business was in Pennsylvania, under the jural entity concept, was a citizen of Pennsylvania. We submit, therefore, that this action should have been and should be dismissed for want of diversity of citizenship.

Respondent will not suffer any hardship if she cannot sustain her case in the federal courts, where she prefers to be because of the possible larger verdicts (Plaintiff's Answer to Defendants' Motion to Stay Proceedings, p. 4), because she entered a suit against petitioners and Dr. Kelly, the real tortfeasor, in the Court of Common Pleas of Mercer County, Pennsylvania, before she filed this action in the District Court (8a, 16a, 26b) and she would not be precluded by any dismissal of this action on jurisdictional grounds from proceeding in the State court action.

Conclusion

The Court of Appeals in the determination of whether the relationship between two parties was master and servant or employer and independent contractor, in a diversity case, failed to ascertain the applicable State law from all the available data and instead prescribed a different rule premised only the Court's opinion of what the State's highest court might decide on the precise facts of the case at bar, and therefore evinced a plain hostility to the Rules of Decision Act and the doctrine established by this Court in *Erie* and subsequent decisions. The Court of Appeals, in a diversity case, applied wrong State law to the facts before it and followed a procedure in conflict with the procedure

prescribed by decisions of this Court and Federal Courts of Appeals, because it did not compare the proofs or the words in the case at bar with those in the analogous cases which have been passed on in the highest court of the State and follow the State law in those decisions. The Court of Appeals also disregarded the provisions of Rule 51 and the general rule as to scope of review in Federal courts. The Court of Appeals also misused its judicial power of review and reached a decision in conflict with the decisions of other Federal Courts of Appeals, because it overruled a permissible conclusion of a District Court on a question of local law, not because it was clearly erroneous, but because on guessing, informed guessing if you will, the Court of Appeals guessed that the State's highest court might, on the same facts, decide in accordance with what the Court of Appeals thought was the more superior rule. Finally, viewing the case at bar by the actualities of the litigation, this is an action by a Pennsylvania plaintiff against a Pennsylvania defendant partnership and should, therefore, be dismissed.

This Court should exercise its supervisory power over the Federal courts to resolve the questions of far-reaching importance in the administration of the work of the Federal courts raised in the case at bar.

For all or any one or more of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MILTON W. LAMPROPLOS,
Attorney for Petitioners.

APPENDIX A

I.

28 U.S.C. §1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

II.

Section 1 of the Pennsylvania Act of 1911, P. L. 639, as amended, 63 P. S. §401a.

Section 1. Practice of medicine or surgery without license prohibited; penalties

"It shall not be lawful for any person in the State of Pennsylvania to engage in the practice of medicine and surgery, or pretend to a knowledge of any branch or branches of medicine and surgery, or to hold himself or herself forth as a practitioner in medicine and surgery, or to assume the title of doctor of medicine and surgery or doctor of any specific disease, or to diagnose diseases, or to treat diseases by the use of medicines and surgery as defined in section 1 (c) of this act or by any other means, or to sign any death certificate, or to hold himself or herself forth as able to do so, excepting those hereinafter exempted, unless he or she has first fulfilled the requirements of this act and has received a certificate of licensure from the board, which license shall be properly recorded in the office

of the Superintendent of Public Instruction at Harrisburg.

"On first offense any person wilfully violating the provisions of this section of this act shall, upon conviction, be deemed guilty of a misdemeanor and shall be subject to a fine of not more than five hundred dollars or imprisonment for not more than six months in the county prison, or both or either, at the discretion of the court; on second offense shall be subject to a fine of not less than five hundred nor more than one thousand dollars and imprisonment of not less than six months nor more than one year, at the discretion of the court: Provided, That this section shall not apply to those persons who, under the laws of the Commonwealth, at the date of passage of this act have been accorded the right by a licensing certificate to diagnose and treat disease medically and surgically and to sign the form of death certificate required by the laws of this Commonwealth, or who are exempt therefrom by further provisions of this act. 1911, June 3, P. L. 639, § 2, as amended, 1941, Aug. 6, P. L. 903, §1."

III.

28 U.S.C.A., §1332. Diversity of citizenship.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States:

" * * * * * "

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,062

EMMA JEAN BROWN, Executrix of the Estate of GEORGE R. BROWN, Deceased,

Appellant,

v.

MARTHA R. MOORE, WILLIAM W. RICHARDSON, JR., JULIA R. CORBIN and ROBERT R. RICHARDSON

v.

WILLIAM R. INGRAHAM

On appeal from the United States District Court for the Western District of Pennsylvania

Present: BIGGS, Chief Judge, and MCLAUGHLIN and HASTIE, Circuit Judges.

Judgment.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause remanded with the direction to reinstate the judgments in favor of the plaintiff.

Attest:

IDA O. CRESKOFF,

Clerk.

June 27, 1957